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No. 88-606

In the Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF BAYTOWN, TEXAS, ET AL.,
Petitioners,

v.

TONY CAMPOS, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

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TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, the City of Baytown, Texas, *et al.*, file this their Reply Brief in reply to Respondents' Brief in Opposition and in support of the Petition for a Writ of Certiorari.

INTRODUCTION

The key element setting this case apart from other Voting Rights Act cases arising since this Court's landmark decision in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) is Respondents' aggregation of two separate minority populations—a racial minority and a language minority—to meet the threshold

legal requirements set forth in that case. This aggregation was approved by the courts below and is described by Respondents as "settled law," consistent with *Thornburg v. Gingles* and Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, *et seq.* Respondents further claim that their aggregation of minorities was not necessary to meet the *Thornburg v. Gingles* standards as "Hispanics alone proved a vote dilution claim." Respondents' Brief at 7.

These assertions are incorrect as a matter of law, given the findings of fact made by the district court in this case, and based upon Respondents' own evidence and exhibits. Petitioners would show that the courts below have incorrectly applied the standards set forth in *Thornburg v. Gingles*, and impermissibly strained the history and policies of the Voting Rights Act.

I.

THE ERRORS OF LAW COMMITTED BY THE COURTS BELOW ARE INSEPARABLE FROM THE FINDINGS OF FACT.

Petitioners contend that, as to all three of the *Thornburg v. Gingles* threshold requirements, the lower courts directly and seriously misapprehended significant facts, resulting in substantial injustice. Such misapprehension certainly requires review by this Court pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. Respondents assert, however, that this Court should not review these findings of fact as a result of the holding in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, where this Court held that it could not "undertake to review concurrent findings of fact by two courts below *in the absence of a very obvious and exceptional showing of error.*" 336 U.S. 271, 275, 69 S.Ct. 535, 538, 93 L.Ed. 672 (1949) (citations omitted) (emphasis added). Petition-

ers contend that such an obvious and exceptional showing of error has been made in this case.

As set forth below, the findings of the district court were based upon an erroneous analysis of total population figures rather than voting age figures. Furthermore, this Court has refused to follow the "two-court rule" set forth in *Graver* where, as in the instant case, constitutional or important public policy questions are at issue. *See, United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404, 61 S.Ct. 291, 297, 85 L.Ed. 243 (1940); 5A J. Moore & J. Lucas, *Moore's Federal Practice*, § 52.12 (2d ed. 1984).

Additionally, Respondents are not correct when they assert that the law in this area is settled and uniform. As to which elections are to be examined in the given jurisdiction, the Fifth Circuit Court of Appeals below has held that the preferred candidate of minority voters is necessarily a minority candidate. This position is in conflict with the plurality opinion in *Thornburg v. Gingles*, with academic discourse from which much of that opinion was based,[1] with the legislative history of the amendments to the Voting Rights Act,[2] and with pronouncements of the Eleventh Circuit Court of Appeals in *City of Carrollton Branch of the National Association for the Advancement of Colored People v. Stallings*, 829 F.2d 1547, 1557 (11th Cir. 1987), *cert. denied*, — U.S. —, 108 S.Ct. 1111, 99 L.Ed. 2d 272 (1988). A resolution of this issue is essential for the numerous Voting Rights Act cases presently pending before the district courts.

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[1] Blacksher & Menefee, "From *Reynolds v. Sims* to *City of Mobile v. Bolden*," 34 Hastings L.J. 1, 59 (1982) (hereinafter Blacksher & Menefee).

[2] S.Rep. No. 97-417, 97th Cong. 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News, p. 177, 207-208.

II.

THE VOTING RIGHTS ACT NEITHER CONTEMPLATES NOR AUTHORIZES THE AGGREGATION OF OTHERWISE UNRELATED MINORITIES.

Respondents' assertion that Black and Hispanic voters in Baytown can be aggregated into a single minority coalition in order to meet the three part threshold analysis prescribed by *Thornburg v. Gingles* has no basis in that decision nor in the Voting Rights Act or the legislative history thereto. Pursuant to *Thornburg v. Gingles*, Respondents can establish a violation of the Voting Rights Act only by proving, among other elements, that a defined minority class is sufficiently *large* and geographically compact as to constitute an effective majority in a potential single-member district. *Thornburg v. Gingles*, 106 S.Ct. at 2766-67. This element of the three part threshold analysis is a prerequisite to a court's examination based upon a totality of the circumstances.

In the instant case, the district court correctly found that, "Hispanics constitute 16.42% of the population of Baytown and Blacks constitute 8.95%." *Campos v. City of Baytown*, 696 F.Supp. 1128, 1129, Petitioners' Appendix at 1a-2a (S.D. Tex. 1987), *vacated*, 840 F.2d 1240 (5th Cir. 1988). However, an analysis of a minority's ability to elect candidates of its choice should be measured not by the total population, but rather by the voting age population. In prescribing the threshold analysis, the *Thornburg v. Gingles* Court repeatedly utilized the term "minority voters" in describing the units by which vote dilution is measured. *Thornburg v. Gingles*, 106 S.Ct. at 2766-67, at n.17, *quoting* Blacksher & Menefee at 55-56; *see, McNeil v. Springfield Park District*, 666 F.Supp. 1208, 1211 (C.D. Ill. 1987); *Romero v. City of Pomona*, 665 F.Supp. 853, 864 (C.D. Cal. 1987). When measured by age, Hispanics constitute only

13.43 percent of the voting age population of Baytown and Blacks constitute only 7.84 percent. Employment and Training Administration, U.S. Department of Labor, 1980 Census, Run No. 840315 (1980), Plaintiffs' Exhibit No. 14. This is the evidence that the district court should have considered in its findings of fact.

Due to the dispersion of Hispanics and Blacks throughout the City, Respondents can propose, at best, one district containing 50.7 percent Hispanics by population, and another district containing 24.7 percent Blacks by population. Plaintiffs' Exhibit Nos. 7 and 6 respectively. Reducing these figures to reflect voting age population, the largest Hispanic district would contain 41.0 percent Hispanics of voting age, and the largest Black district would contain 22.5 percent Blacks of voting age. The Hispanic figure should be reduced further to account for non-citizens who would not be eligible to vote. As the court explained in *Latino Political Action Committee, Inc. v. City of Boston,* "[w]here voting is highly polarized, a 65 percent figure is a generally accepted threshold which has been used by the Department of Justice and reapportionment experts." 784 F.2d 409, 414 (1st Cir. 1986) (citation omitted). Thus neither Blacks nor Hispanics individually constitute a sufficiently large minority as to be an effective majority in a single member district.

Faced with these facts, Respondents sought to aggregate all Black and Hispanic citizens in Baytown in an effort to meet the numerosity element of this threshold analysis. This aggregation should not be allowed. *See, Williams v. State Board of Elections,* 696 F.Supp. 1559 (N.D. Ill. 1988). The Voting Rights Act does not envision the aggregation of separate and distinct minorities in order to establish a claim of vote dilution. The original Voting Rights Act, passed in 1965, was clearly aimed at

enfranchisement of Blacks in the South. S. Rep. No. 97-417 at 182-83. At that time, Congress did not address vote dilution allegedly suffered by Hispanics. *See*, S. Rep. No. 1564, 89th Cong. 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News, p. 480.

Ten years later, the Voting Rights Act was extended to Hispanics by the 1975 Amendments, which were designed to enfranchise language minorities deprived of effective political participation by the use of English only elections. S. Rep. No. 97-417 at 186. At no time has Congress suggested that these two otherwise unrelated racial or ethnic groups can be treated as a single minority for purposes of establishing a cause of action under the Voting Rights Act. The theory behind a vote dilution suit is that a racial or ethnic group has been excluded from the political process by virtue of its status *as a racial or ethnic group*. Interest groups and other political coalitions are not entitled to claim dilution under the Voting Rights Act. *See, Williams v. State Board of Elections*, 696 F.Supp. 1574, 1579 (N.D. Ill. 1988). Any attempt to protect special interest groups not within the same racial or ethnic minority raises the spectre of promoting the Voting Rights Act from an instrument for the protection of minority voters to one for the protection of voting minorities. *League of United Latin American Citizens, Council No. 4386 v. Midland Independent School District*, 812 F.2d 1494, 1504 (5th Cir. 1987) (Higginbotham, J., dissenting).

In any other context, it is doubtful that Hispanics and Blacks would argue that they are the same minority. For example, if Hispanics were routinely elected in an at-large election system, Respondents' theory would preclude a large and geographically compact Black group from maintaining a Voting Rights Act claim because

"their" candidates (*i.e.*, the Hispanic officials) were already elected. *See, Campos v. City of Baytown, Texas*, 849 F.2d 943, 945 (5th Cir. 1988) (Higginbotham, J., dissenting from order denying rehearing).

III.

IF AGGREGATION IS PERMITTED BY THE VOTING RIGHTS ACT, THEN THE COMBINED MINORITY MUST SURVIVE THE ENTIRE THORNBURG v. GINGLES ANALYSIS AS A SINGLE MINORITY.

Assuming, *arguendo*, that the Voting Rights Act does authorize the aggregation of distinct minorities in order to meet the numerosity requirement set forth in *Thornburg v. Gingles*, then in order to prevail, Respondents must show that Blacks and Hispanics in Baytown, taken together, meet *each* element of the threshold analysis set forth above. It is not sufficient to show some elements for one or the other of the minorities constituting this new class, but rather the claim of this newly created class must stand or fall on the evidence applicable to the class in its entirety. This Respondents have failed to do.

Respondents state that "the District Court found the existence of racially polarized voting in Baytown through the use of regression analysis." Respondents' Brief at 9 (citations omitted). At trial, Respondents initially presented their evidence in separate analyses of Black and Hispanic support for Black and Hispanic candidates respectively. Plaintiffs' Exhibit No. 15. The analysis presented in Plaintiffs' Exhibit No. 15 represents an ecological correlation and regression analysis of Hispanic support for certain Hispanic candidates, and Black support for certain Black candidates. No attempt was made in Plaintiffs' Exhibit No. 15 to measure the support of the

combined Black and Hispanic minority class for all minority candidates. The district court accepted this evidence as illustrative of racial polarization. *Campos v. City of Baytown*, 696 F.Supp. at 1130-31, Petitioners' Appendix at 3a-6a.

In response to claims by Petitioners that such an analysis did not accurately reflect the combined minority support for minority candidates, Respondents produced Plaintiffs' Exhibit No. 19, which shows the combined correlation coefficient of Black and Hispanic voters in support of the same candidates analyzed in Plaintiffs' Exhibit No. 15. A comparison of Plaintiffs' Exhibit Nos. 15 and 19, however, reveals a significant decrease in the "r" value[3] when Black voters are analyzed with Hispanic voters. Thus, for example, while Hispanic voters voted as a bloc for Mario Delgado in his 1986 campaign for city council ("r" of 0.92), Black and Hispanic voters combined exhibited a significantly reduced support ("r" of 0.69). This is especially significant as the Hispanic population in Baytown outnumbers the Black population at a ratio of almost two to one. An analysis of the 1984 campaign of Tony Campos for city council district one produces similar results. Although Hispanic voters supported Mr. Campos as a bloc ("r" of 0.86), the combined support of Hispanic and Black voters for Mr. Campos dropped substantially ("r" of 0.52).

Respondents' inclusion of Black voters is necessary to meet the numerosity requirements set forth by this Court in *Thornburg v. Gingles*. Absent Black support for Hispanic candidates, however, the issue arises as to the de-

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[3] The "r" value represents the bivariate correlation coefficient relating proportion of votes received by the minority candidate to the estimated proportion of voters in the precinct which are of the same ethnic group.

gree of support required between two separate and distinct minority groups in order to establish their cohesiveness as a single minority class. By their Petition for a Writ of Certiorari, Petitioners seek instruction from this Court as to how the elements of the threshold analysis established in *Thornburg v. Gingles* should be applied in a multiple minority context.

IV.

IN THIS CASE HISPANIC VOTERS ALONE CANNOT ESTABLISH A VIOLATION OF THE VOTING RIGHTS ACT.

In response to the arguments raised by Petitioners, Respondents state that "the issue of combining minorities is moot" as Hispanics alone have established a violation of the Voting Rights Act in this case. Respondents' Brief at 8.

Respondents state that, "[i]n its findings of fact, the District Court found that Hispanics met the threshold [*Thornburg v.*] *Gingles* elements of compactness, cohesiveness and white bloc voting." Respondents' Brief at 7. Respondents argue that Plaintiffs' Exhibit Nos. 5-7 indicate that it is possible to create three city council districts with a maximum Hispanic *population* of 50.7 percent, and an average of 50.1 percent. As discussed above, this number falls to approximately 41.0 percent when only the voting age population of the Hispanic group is measured, and an even lower figure when only United States citizens are counted. The threshold elements set out in *Thornburg v. Gingles* require, in addition to compactness, cohesiveness and white bloc voting, that the Plaintiff class prove that it is sufficiently large as to constitute an effective majority in a single member district. 106 S.Ct. 2766-67. Respondents' argument that His-

panic voters, by themselves, satisfy the three part *Thornburg v. Gingles* threshold analysis is blatantly untrue.

CONCLUSION

In setting forth the three part threshold analysis in *Thornburg v. Gingles*, this Court established the standard by which a Voting Rights Act claim is analyzed. That case involved only one minority, however, thereby allowing for a simpler bivariate analysis of Black and white voting patterns. Presently throughout the West and Southwest, district courts are facing claims brought by multiple minorities, raising important issues not addressed by this Court in *Thornburg v. Gingles*. Without additional guidance regarding the correct analysis for such multivariate claims, district courts will continue to create a patchwork of inconsistent standards. The instant case offers this Court a ripe opportunity to clarify these issues.

Respectfully submitted,

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